Supreme Court, U.S.
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No. 06-68

IN THE

Supreme Court of the United States

KENNETH A. MAUDER,

Petitioner,

v.

METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals properly affirmed summary judgment dismissal of Plaintiff's claim under the Family and Medical Leave Act pursuant to the undisputed material facts contained in the record.

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STATEMENT OF THE CASE[1]

Petitioner filed this lawsuit against Respondent the Metropolitan Transit Authority of Harris County, Texas ("Metro") in the United Stated District Court for the Southern District of Texas, Houston Division on January 13, 2003.[2] (R. 7). In his First Amended Complaint, Petitioner asserted claims for alleged violations of the American with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). (R. 23). On June 22, 2004, Metro filed its Motion for Summary Judgment ("Metro's Motion"). (R. 145). In his Response to Metro's Motion, Petitioner expressly abandoned his ADA claims. (R. 391). On March 28, 2005, the District Court granted Metro's Motion for Summary Judgment in all respects and entered a Final Judgment in favor of Metro. (R. 515-527).

On Appeal, the Fifth Circuit affirmed the judgment of the District Court. The Fifth Circuit's holding is two-fold, addressing both Petitioner's claim for "temporary leave" under the FMLA, as well has his retaliation claim under the FLMA. However, Petitioner has not sought to challenge or appeal the dismissal of his retaliation claim in his Petition for Writ of Certiorari. Accordingly, the only relevant portion of the Fifth Circuit's ruling is that which deals with Petitioner's FMLA claim under the Act's "entitlement

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1. Unless otherwise noted, citations set forth herein are to the Fifth Circuit Record.

2. Metro is a public entity established by Texas Civil Statute Article 1118x pursuant to voter approval of a regional referendum held on August 12, 2978. Article 1118x is now codified in Chapter 451 et. seq. of the Texas Transportation Code.

provision." In that regard, the Court of Appeals ruled as follows:

> Based on the facts of this case, even assuming arguendo that Mauder has satisfied the requirements for a 'serious medical condition' for either diarrhea or diabetes under the FMLA, the record reflects that he has not shown that this serious medical condition left him incapacitated, as required by the statute.

Mauder v. Metropolitan Transit Authority, 446 F.3d 574, 581 (5th Cir. 2006).

Moreover, after citing numerous cases from courts across the country which have addressed the issue, the Fifth Circuit concluded as follows:

> . . . Furthermore, as we have previously explained the FMLA recognizes diabetes as an example of a chronic serious health condition that may cause episodic rather than a continuing period of incapacity.
>
> Accordingly, we find that Mauder has not shown that the was incapacitated or that his condition prevented him from going to work. 29 C.F.R. § 825.114(a)(2)(i) (2006)(explaining that the statute applies when one is unable to work due to a serious health condition, treatment therefore, or recovery therefrom). He does not meet the requirements of 29 C.F.R. § 825.114(a)(2) – the regulation defining a 'serious health condition involving continuing treatment by a healthcare provider' for purposes of FMLA leave.

Id. Accordingly the Court held as follows:

> Therefore, because Mauder has not proven that his medical condition left him incapacitated even temporarily, we hold that the district court did not err in determining that Mauder was not entitled to FMLA leave. 29 C.F.R. § 825.114(a)(2).

Id. at 582.

Additionally, the court also noted that:

> . . . the record is clear that Metro should also not be held accountable for not providing Mauder with FMLA leave because Mauder did not provide information requested by Metro that was needed to process Mauder's demands for flexible bathroom breaks.

Id. Therefore, the court also ruled that:

> Mauder's failure to provide his employer with requested information to effectuate the leave he asked for in the first place is a sufficient reason for us to hold that the district court did not err in granting summary judgment in favor of Metro on this issue. Mauder was not entitled to leave under the FMLA.

Id. 582-83.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner's Petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve (1) a conflict among United States courts of appeals, (2) a conflict between a United States court of appeals and a state court of last resort, (3) a conflict on an important federal question among state courts of last resort, or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a garden variety claim of alleged employment discrimination. Moreover, the asserted error in this case regarding the Fifth Circuit's alleged "misconstruing" of the applicable regulation (*see* Petition at page 22) is in actuality nothing more than allegations of erroneous factual findings. While framing the issue as one of interpretation of a federal regulation, on pages 22 and 23 of the Petition for Writ of Certiorari, Petitioner does nothing more than attempt to argue that the Fifth Circuit made erroneous factual findings or misapplied properly stated rules of law. Indeed, Petitioner specifically asserts at page 23 of his Petition that "[t]here is factual a sufficiency issue worth of this Court's review." [Sic.] Those are precisely the type of allegations which Rule 10 provides are not appropriate for certiorari. Accordingly, Petitioner's Petition should be denied.

II. The Petition Fails On The Merits.

A. The Fifth Circuit Correctly Ruled That Petitioner Was Not Incapacitated Under The FMLA Because The Petitioner Did Not Show That He Was Unable To Work.

Petitioner's core argument is that the Fifth Circuit erred in ruling that diarrhea is incapacitating for purposes of the FMLA only where it is "so debilitating that the employee cannot physically go to work." (*See* Petition at page 15). (quoting *Mauder*, 446 F.3d at 581). Citing 29 C.F.R. §§ 825.114 and 825.115, Petitioner asserts that "incapacity" does not require absence from or inability to work. However, the very regulations the Petitioner cites directly contradict Petitioner's argument. First, 29 C.F.R. § 825.114(a)(2)(i) defines "a period of incapacity" as "*inability to work*, attend school or perform other regular activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 C.F.R. § 825.114(a)(2)(i) (emphasis added). Further, 29 C.F.R. § 825.114(e) provides the following two examples of FMLA protected incapacity:

> For example, an employee with asthma *may be unable to report for work* due to the onset of an asthma attack or because the employee's health care provider has *advised the employee to stay home* when the pollen count exceeds a certain level. An employee who is pregnant *may be unable to report to work* because of severe morning sickness.

29 C.F.R. § 825.114(e) (emphasis added).

In addition, the Fifth Circuit and other courts have repeatedly held that "incapacity" under the FMLA requires inability to work. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 334-35 (5th Cir. 1997), (holding that plaintiff did not have a "chronic serious health condition" where her doctor never took her off work "altogether"); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F.Supp. 1028, 1035-37 (M.D. Tenn. 1995) (same); *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1075 (9th Cir. 1999) (holding that alleged psychological problems did not amount to a chronic serious health condition because "there is no evidence whatsoever in the record that Shaun suffered any ***period of incapacity – inability to perform regular daily activities***") (emphasis added).

Section 825.115 also provides no support to Petitioner. In pertinent part, that provision states as follows:

> "An employee is 'unable to perform the functions of the position' ***where the health care provider finds*** the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position. . . . An employee ***who must be absent from work to receive medical treatment*** for a serious health condition is considered to be unable to perform the essential functions of the position ***during the absence for treatment.***

29 C.F.R. § 825.115 (emphasis added). As an initial matter, the record is devoid of any finding by Petitioner's doctor that Petitioner was "unable to work at all" or "unable to perform any one of the essential functions of [Petitioner's] position. To the contrary, Petitioner's doctor released him to

return to work without any medical restrictions. (R. 226, 373). Likewise, although Section 825.115 states that employees who are "absent from work to receive medical treatment" are considered "unable to perform the essential functions" of their jobs, Petitioner never sought treatment for his alleged diarrhea and Petitioner's doctor never provided any such treatment. (R. 184, 219, 380). Thus, 29 C.F.R. § 825.115 simply does not support Petitioner's assertion that he was incapacitated within the meaning of the FMLA.

B. Petitioner Cannot Establish That Metro "Denied" Or "Interfered" With His Alleged Right To Unscheduled Restroom Breaks Because Metro Never Prevented Petitioner From Going To The Restroom.

Petitioner contends that Metro "unlawfully denied [him] his rights under the FMLA" and "interfered with [his] rights under the FMLA." (*See* Petition at page 3). In this regard, Petitioner asserts that he should have been granted "intermittent leave" for "restroom breaks." (*See* Petition at page 18). However, Petitioner ignores the fact that *Metro never prevented the [him] from going to the restroom.* (R. 215, 327). Indeed, Petitioner testified "If I had to go to the restroom, I went to the restroom." (R. 215). Petitioner also testified that he never soiled himself at Metro as a result of failing to make it to the restroom in time. (R. 377). Thus, if (as Petitioner contends) each restroom break constituted an instance of "intermittent" FMLA leave, then Petitioner took all the "leave" to which he allegedly was due. Likewise, if (as Petitioner also contends) each restroom break constituted an instance of "intermittent leave," then it would also have to be the case that Petitioner was "reinstated" to his job every time he returned to his desk following a trip to

the restroom. However, *there is no evidence whatsoever in the record indicating that Petitioner was ever prevented from returning to his desk to continue working following any trip to the bathroom*. Accordingly, Petitioner's substantive violation claim fails as a matter of law.

C. Petitioner's Allegations That He Was Disciplined And Discharged Do Not State Claims For Denial Of Substantive FMLA Rights.

Petitioner's allegations that he was disciplined and ultimately discharged for going to the restroom do not state claims for denial of substantive FMLA rights. The Fifth Circuit has held that "employers have a prescriptive obligation under the FMLA – they must grant employees substantive rights guaranteed by the FMLA – and they have a proscriptive obligation – they may not penalize employees for exercising their rights." *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999).

The Fifth Circuit has also explained the difference between those prescriptive and proscriptive rights:

> Under the FMLA, an eligible employee is entitled to take up to 12 work weeks of leave in a 12-month period when, *e.g.*, the employee has a serious health condition that makes her unable to perform the duties of her position. After a qualifying absence, the employer must restore the employee to the same position previously held by the employee before taking leave under the FMLA or a comparable position, with equivalent pay, benefits, and working conditions. **These comprise the prescriptive or substantive FMLA rights;**

> **claims for violations of these rights invoke entitlement or interference theories** and are brought under § 2615(a)(1). **The proscriptive FMLA rights include an employee's right not to be discriminated against for having exercised the right to take FMLA leave.** Claims for violations of these rights are brought under § 2615(a)(2). **These proscriptive FMLA provisions create a cause of action analogous to the actions for discrimination and for retaliation that are found in Title VII and the other discrimination statutes.**

Haley v. Alliance Compressor LLC, 391 F.3d 644, 649 (5th Cir. 2004) (emphasis added) (internal citations omitted). Thus, Petitioner's allegations that he was penalized and discharged for going to the restroom do not state a claim for violation of any alleged substantive FMLA rights. *See Chaffin*, 179 F.3d at 319 ("Chaffin makes no claim that Cater denied her a substantive entitlement under the FMLA. *Rather, she contends that Carter punished her for exercising her right under the FMLA to take leave. She therefore is asserting a violation of a proscriptive duty.*") (Emphasis added.)

D. Petitioner's Eleventh Hour Request For FMLA Leave Did Not Require Metro To Suspend Its Previously Planned Discharge Of Petitioner.

Petitioner was placed on a one-month corrective action plan, effective September 13, 2002. (R. 250-251). Petitioner was advised that the corrective action period would end on October 11, 2002, and he was advised that "[f]ailure to adhere to the established guidelines during the 30 day probationary

period, and thereafter, will result in immediate termination." (R. 251). Indeed, in his deposition, Petitioner admitted that he knew he could be terminated if he did not improve his performance by the October 11, 2002 deadline. (R. 218). On October 4, 2002, exactly one week before the conclusion of the corrective action period, Petitioner made a request for FMLA leave. (R. 27, 200, 202, 265). Petitioner asserts that 29 C.F.R. § 825.305(b), which provides that employers must allow employees 15 days to return FMLA certification forms, required Metro to suspend its previously planned decision to discharge [him] at the conclusion of the corrective action period. As explained below, this Court has previously ruled that arguments such as those made by Petitioner in this regard have no merit.

"***Employers need not suspend previously planned [employment actions] upon discovering that [an employee has engaged in protected conduct]***, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001) (emphasis added). Although *Clark County* is a Title VII case, it is instructive and factually analogous to this case. In *Clark County*, the plaintiff in part alleged that she had been transferred to a different position in retaliation for filing a Title VII action. *Clark County*, 532 U.S. at 271. The evidence showed that the plaintiff filed her lawsuit on April 1, 1997, and, on April 10, 1997, the plaintiff's supervisor "mentioned" to the president of the plaintiff's union that she was "contemplating" transferring the plaintiff. *Id.* at 271-72. The actual job transfer occurred in May. *Id.* at 272. The employer filed a motion for summary judgment, arguing that there was no causal connection between the filing of the plaintiff's lawsuit and the transfer.

Id. In response, the plaintiff relied on the temporal proximity between the filing of her lawsuit and her supervisor's statement that she was contemplating transferring the plaintiff. *Id.*

The district court granted the employer's motion for summary judgment based on the fact that the defendant was not served with the lawsuit until April 11, 1997 (i.e., one day after the supervisor's remark) and based on the supervisor's uncontradicted testimony that she did not learn of the lawsuit until after April 11, 1997. *Id.* Thus, the district court found no causal connection between the lawsuit and the transfer because the employer was already *considering* taking the allegedly adverse employment action against the plaintiff before it learned of the plaintiff's protected conduct.

The Ninth Circuit Court of Appeals reversed, relying in part on the fact that the actual transfer occurred one month after the supervisor learned of the plaintiff's lawsuit. *Id.* This Court reversed the Ninth Circuit, finding that the fact that the actual transfer occurred after the supervisor learned of the lawsuit was "immaterial in light of the fact that [the supervisor] concededly was ***contemplating*** the transfer before [she] learned of the suit." *Id.* (emphasis added). Rather, this Court held that "**[e]mployers need not suspend previously planned [employment actions] upon discovering that a Title VII suit has been filed, and their** *proceeding along lines previously contemplated, though not yet determined, is no evidence whatever of causality.*" *Id.* (emphasis added).

The policy rationale behind that rule is clear and equally applicable in FMLA cases as it is in Title VII cases. Specifically, if an employee who knows he or she is about to

be fired for poor performance can forestall the discharge simply by asserting an entitlement to FMLA leave, no planned employment termination could ever be implemented. A clever employee could repeatedly postpone his planned discharge every 15 days by simply asserting and reasserting a need for FMLA leave. In the context of Title VII retaliation claims, this Court has ruled that such last minute assertions of protected rights do not prevent an employer from following through on a previously planned employment decision. Petitioner has cited no case nor presented any reason for treating an employer's FMLA obligations differently.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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